92-1044

No.

Supreme Court, U.S.
FILED
JUN 9 1992
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IN THE
Supreme Court of the United States

October Term, 1991

BRIAN DEFOOR,
*Petitioner,*

versus

UNITED STATES OF AMERICA,
*Respondent.*

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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APP

## QUESTIONS FOR REVIEW

I. Whether the trial court committed reversible error and abused its discretion in denying Petitioner's Motion for Severance from the Joint Trial?

II. Whether the Government failed to establish the essential elements of a conspiracy, thus violating Petitioner's right to due process by convicting him on insufficiency of the evidence?

## CERTIFICATE OF INTEREST PERSONS

Trial Judge:

The Honorable Robert L. Vining, Jr.
United States District Court
Northern District of Georgia

Assistant United States Attorneys:

Allen Moye and
Art Leach

Petitioner and Counsel:

Brian Defoor, Petitioner
James Berry, Esquire, Trial Counsel
Robert G. Fierer, Esquire, Appellate Counsel

Co-defendants and Counsel:

Roger Thomas Eley
Jerry Froelich, Esquire and
Guy Davis, Esquire

David Smith
Michael Abbott, Esquire

James Davis
William Morrison, Esquire

Charles Larry Jones
Jay Strongwater, Esquire

Judy Jones
Glen Galbaugh, Esquire

Timothy Barnes
Ted Herbert, Esquire

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## OPINION BELOW

Petitioner was convicted after a jury trial in United States District Court for the Northern District of Georgia, Atlanta Division, on May 22, 1990, and sentenced on September 20, 1990. Petitioner appealed his conviction to the Eleventh Circuit Court of Appeals which affirmed on March 10, 1992.

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. Section 1254. This is a direct appeal of a criminal conviction and sentence in the United States District Court for the Northern District of Georgia, Atlanta Division, affirmed in the Eleventh Circuit Court of Appeals.

## STATUTORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 14

Federal Rule of Criminal Procedure 29

## STATEMENT OF THE FACTS

The charges against Petitioner stem from an ongoing investigation conducted by the Drug Enforcement Administration (DEA) and the Georgia Bureau of Investigation (GBI). The government charged that from 1983 until the fall of 1988, Petitioner, along with defendants, Charles Larry Jones, Timothy Barnes, James P. Davis, Roger Eley, Judy Jones, David Smith, and other unnamed individuals, conspired to manufacture, distribute and possess with intent to distribute cocaine hydrochloride. (R-22-29.) The Government set up an electronic interception of the Jones' telephone in July of 1988. (R-22-32.) At that time they also began physical surveillance which agents alleged showed meetings between Charles Larry Jones, Judy Jones and Brian Defoor. (R-22-32-33.)

The object of the conspiracy allegedly was to acquire cocaine from many sources, including Dennis Larry White, Cliff Sherwood and to distribute the cocaine

for profit. Allegedly, from 1985 until 1988, Dennis Larry White and Rom-Lar, Inc., a Florida corporation, utilizing the services of Bruce Brasher and Cliff Sherwood (R-22-38-40), secured cocaine from Miami, Florida, and elsewhere, and delivered the same to Eley and James Craft in Daytona Beach, Florida, and McIntosh County, Georgia (R-33-37-38) where Eley and White had houses. (R-22-37.)

The government presented evidence to show that Defendant Eley, through his contacts, was able to supply the conspiracy with an unlimited supply of cocaine. (R-22-35.) The prosecution contended that Eley delivered cocaine to Defendant David Smith, who transported the same to northern Georgia and distributed it to Defendants Charles Larry Jones and James Davis. Purportedly then Defendant Jones delivered quantities of cocaine to Defendants Barnes, DeFoor, Judy Jones and others for distribution. Defendant Charles Larry Jones paid Donald

Miles and Defendants David Smith and Roger Eley for the cocaine he distributed.

Gordon Montcalm testified that Charles Jones approached him in the fall of 1986 about getting into the business of selling cocaine. Jones trained Montcalm to cut, package and distribute cocaine. (R-22-30, 17-22-23.) In the fall of 1987, Jones and Montcalm broadened their interest in the drug business to manufacturing methamphetamine. (R-22-30, 17-34-35.) They attempted to establish laboratories in LaGrange and Temple. (R-17-4.)

During trial, none of the non-police informants testified about Petitioner Defoor. Except for the government agents, his name was not mentioned in the alleged conspiracy. The only co-defendants whom Petitioner had ever even known before trial were Charles Larry Jones and Judy Jones. He had repaired automobiles and boats for them in years past although he had not seen them from 1986 until the Spring of 1988.

At trial the government admitted that the tapes were the main case against Petitioner. (R-30-15.) Among the over 2,100 intercepted communications submitted, DeFoor was only accused of being recorded on 12 of them. (R-19-148.) These conversations were only between Defoor and the Jones' and there was some doubt as to whether the conversations pertained to the economics of the cars and boats or otherwise. (R-29-121-127.)

The evidence presented against Petitioner included the following. The government attempted at trial to place Petitioner at the Sprayberry Crossing Shopping Center on July 25, 1988, in a black truck pulling a boat and meeting with the Jones' in their red Cadillac. (R-18-107.) This was elicited in the testimony of Agent Whittaker. (R-18-115-117.) Neither this agent, nor any of the others, could positively identify the male in the truck. However it was allegedly observed that this male met with another who emerged from the Cadillac. According to the agent, the parties

looked at the boat on the back of the truck and then exchanged a package. No proof whatsoever was offered to prove that the package contained any contraband. In fact, the agent stated that it could have been a package of tobacco. (R-18-107-110, 115-117.) The surveillance agent then followed the truck back to the Davis Road residence of David Meritt.

The government then attempted to connect Petitioner with this same truck when Agent Maynor, of the Marietta-Cobb-Smyrna Narcotics Unit of the Marietta Police Department, testified that he had traced a traffic ticket of Petitioner to a Davis Road address, which was the residence of David Merritt. (R-19-101-103.) To make a positive identification, the agent posed as a buyer for the truck. (R-19-143-148.)

On August 18, 1988, the police conducted a search at the residence of David Merritt at 2863 Davis Road. (R-18-143.) Shortly after the agents began searching, they found cocaine and marijuana in the house and in Mr.

Merritt's truck they came across cocaine. (R-18-112.) While government agents were searching this residence, Petitioner coincidentally happened to arrive at this address. (R-18-105.) A search of Petitioner's person and his vehicle produced nothing. The agents did not arrest Petitioner but later unsuccessfully tried to prove that he also lived there. (R-18-146-147.) There was no evidence at the house to show Petitioner did live there. (R-18-113-114, 142-159.) David Merritt was arrested and later committed suicide. (R-18-146.)

## STATEMENT OF THE CASE

On September 28, 1989, a superceding indictment charged Petitioner, Brian DeFoor, with two counts of narcotics violations in an eight count indictment. Count One charged Petitioner with a Conspiracy to Possess with Intent to Distribute cocaine in violation of 21 U.S.C. § 841 (a) (1) and § 846, and Count Five charged Petitioner with the Use of Communication Facility to Facilitate Possession with Intent to Distribute Cocaine in violation of 21 U.S.C. § 841(a)(1) and § 843(b). (R-1.)

Petitioner entered a plea of not guilty and proceeded to trial which commenced on April 26, 1990, in the United States District Court for the Northern District of Georgia, Atlanta Division, before the Honorable Robert L. Vining, Jr. (R-2.) At trial, Petitioner was represented by James Berry. Petitioner was tried along with six co-defendants, Roger Thomas Eley, David Smith, James Davis, Charles Larry Jones, Judy Jones, and Timothy

Barnes. After a four week trial, the jury returned with verdicts of guilty as to Counts One and Five, with respect to Petitioner, rendered on May 22, 1990. (R-24.)

Attorney Robert G. Fierer was retained by Petitioner for his sentencing, and subsequent actions. On September 20, 1990, Petitioner was sentenced to serve 78 months on Count One and 48 months on Count Five to run concurrently with Count One. (R-13-4.) A Notice of Appeal was timely filed on September 28, 1990. (R-30.)

Petitioner filed his appeal on May 13, 1991. The oral argument for the case was combined to include arguments of all Co-appellants. The Eleventh Circuit Court of Appeals affirmed the convictions of all Appellants, including Defoor, on March 10, 1992, and Judgment was entered that day. This Petition for Writ of Certiorari is timely filed.

Petitioner is presently incarcerated at the Atlanta Federal Penitentiary after being allowed to self-report in November, 1990.

## ARGUMENT AND AUTHORITY

### I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION IN DENYING PETITIONER'S MOTION FOR SEVERANCE FROM THE JOINT TRIAL.

A defendant may be prejudiced by the admission of evidence, testimonial or otherwise, against a co-defendant. This prejudice may arise from the presentation of antagonistic defenses, co-conspirator statements or confusion resulting to evidence against several defendants. While in some circumstances that prejudice may be neutralized through a thorough cross-examination of the person introducing the evidence, this prejudice cannot be dispelled in that manner when the co-defendant does not take the stand. Moreover, limiting instructions to the jury may not in fact erase the prejudice.

Federal Rule of Criminal Procedure 14 grants defendants relief from prejudicial joinder. Rule 14 provides in pertinent part that:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever relief justice requires.

In evaluating a motion for severance, the district court must balance the potential prejudice to the defendant against the public interest in joint trials where the case against each defendant arises for the same general transactions. United States v. Swanson, 572 F.2d 523, 528 (5th Cir.), cert. denied, 439 U.S. 849 (1978). The district court has a continuing duty to monitor the entire trial for prejudice and to order a severance, if such prejudice does arise.

On appeal from the denial of a motion for severance, an appellant "must show something more than the fact that a separate trial might have offered him a better chance of acquittal." Tillman v. United States, 406 F.2d 930, 935 (5th Cir.), vacated in part on other grounds, 395

U.S. 830 (1969). To secure reversal, jointly-indicted defendants, to show that they were prejudiced by the spill-over effect of evidence against other defendants, must demonstrate that the denial of a severance resulted in specific prejudice against which the trial court was unable to afford protection. United States v. Meester, 762 F.2d 867, reh'g. denied 768 F.2d. 1353, cert. denied, 106 S. Ct. 579 (1985). The Eleventh Circuit standard of "compelling prejudice" has been defined as the jury's inability to separately appraise the evidence as to each defendant and render a fair and impartial verdict. United States v. Marszalkowski, 669 F.2d 655 (11th Cir. 1982).

In the instant case, Petitioner preserved the issue of the denial of severance for consideration by this Court by objecting to Petitioner's trial along-side co-defendants. (R-17-118-119.) United States v. Dennis, 786 F.2d 1029, cert. denied, 107 S. Ct. 1973 (1986). The context and underlying reasons for the objection are critical to appre-

ciating the prejudicial nature of the joint trial.

A. The Introduction of Evidence About a Conspiracy to Manufacture Methamphetamine. Not Charged in the Indictment, Created Prejudicial Confusion Against Petitioner.

Petitioner and his co-defendants at trial were charged with conspiracy to possess with intent to distribute cocaine. (R-1.) At trial, however, the government introduced the existence of yet another conspiracy, one not charged in the indictment, but which allegedly was joined by several of the co-defendants, Petitioner excluded. This second conspiracy was, inter alia, to manufacture methamphetamine.

The interrelationship between the two conspiracies was so profound that the Prosecutor introduced this issue to the court at the onset of the trial, prior to the time the first government witness testified. About one witness' anticipated testimony, Mr. Montcalm's, the Prosecutor stated the following:

> The Court knows from his prior testimony and especially the testimony in the Newnan case his relationship with Mr. Jones revolves around both cocaine and methamphetamine. And they are so bound together.

(R-22-15.)

Petitioner's counsel immediately objected to the introduction of any testimony relating to methamphetamine.

> As I understand the methamphetamine conspiracy was going on at the same time allegedly as the cocaine conspiracy. My client was never charged in the methamphetamine conspiracy. We are susceptible to the spillover also.

(R-22-18.)

Over defendants' objections, the Court allowed the testimony to go forward, commenting,

> It's going to go in whether it pertains to your client or not. They were all indicted together. If I can straighten it out then I will, I can't, I can't. And do the appropriate thing then.

(R-22-18.)

At a later point in the trial, Petitioner's counsel

renewed his objection to the admission of a tape of Call Number 348 which also related to the methamphetamine conspiracy. (R-23-11.)

It was compelling and consummately prejudicial to allow testimony about a conspiracy to manufacture methamphetamine into the cocaine distribution conspiracy trial of multiple defendants, some of whom had absolutely no relationship with the other defendants who allegedly took part in a conspiracy to manufacture. This factor alone was sufficient to warrant a severance in the instant case.

B. A Qualitative Analysis of the Evidence, in Addition to Other Indicia of Jury Confusion, Demonstrates that Petitioner Should Have Been Severed.

Merely demonstrating that the evidence is stronger against a co-defendant than defendant does not satisfy the burden of showing compelling prejudice. United States v. Marable, 574 F.2d 224, 231 (5th Cir. 1978). However, in

certain cases, a quantitative analysis can be of value in demonstrating the prejudice suffered from a joint trial. This is especially telling when, in the presence of other indicia of jury confusion, there are great disparities in the weight of evidence against different defendants. Id. In the case at bar, a quantitative analysis of the evidence against Petitioner is but the first step in demonstrating that sufficient prejudice existed to require severance of Petitioner.

The trial of Petitioner along with co-defendants Eley, C. Jones, J. Jones, Davis and Smith was a lengthy one, lasting about four weeks. Transcripts of the proceedings comprise 15 volumes. Out of the thirty-six law enforcement officers who testified, only three mentioned Petitioner's name, and two of the times were in conjunction with the Davis Road search, to which Petitioner was not linked in any criminal manner. (R-18-103-107, 111-114, 118, 142-149.) Out of seven government informants

who testified, none mentioned Petitioner. The evidence introduced was, in a real sense, voluminous in general, but minute as related to Petitioner. For example, the government relied heavily on over two thousand telephone conversations obtained through a wiretap. (R-23-3.) Additionally, it was demonstrated that because of the incredible numbers of tapes, the identities of the persons speaking were critically obfuscated. (R-20-24.)

Yet another example which shows the great weight of the evidence presented against Petitioner's co-defendants in contrast to the sparse amount against him, can be exacted from the Prosecutor's opening statement. The prosecutor articulated:

> Let me talk a few minutes about the facts of this case. Every criminal case, every litigated case is a story. Some of you perhaps have seen soap opera. This may well be a soap opera. The evidence will be presented in your presence and hearing will tell a story about a particular conspiracy. A conspiracy that was able to bring cocaine from the point of its introduction into the United States in Miami and

> elsewhere, in particular in Southern California to Atlanta through Savannah and Brunswick and Darien and the South Georgia Area and from Miami and Las Vegas through Mississippi Texas Nevada California, Oregon, Washington and Idaho.

(R-22-28.) (Emphasis added.)

This representation—that the conspiracy reached to the far borders of our nation, and even outside this country—was made during a critical point of the government's case, a time when the government can communicate to the jurors what they can anticipate will be presented. The above representation, as it related to Petitioner, however, is highly prejudicial as it implies that Petitioner had knowledge of the bounds of the conspiracy. While others of the alleged co-conspirators may indeed have been aware of the extent of the drug operation, no evidence was ever presented probative of Petitioner's knowledge of the same conspiracy which the prosecutor introduced in his opening statement. Thus, the prosecutor himself underlined the need for Petitioner to

be severed from the trial in his opening statement.

As to the issue of jury confusion, the existence of multiple conspiracies, as articulated above, wholly unassociated with Petitioner, made it difficult for jurors to separate what evidence was admitted probative of what conspiracy. The presentation and illustration of the meth-amphetamine conspiracy in addition to the cocaine conspiracies sufficiently prejudiced Petitioner such that he meets the burden as set forth in Meester, 762 F.2d at 883. The circus of conspiracies impaired the jury's ability to make an individualized determination as to each defendant.

In sum, the quantitative disparity of the evidence introduced against Petitioner, as compared to the other defendants, is dramatic. It is enough, in and of itself, to question the fairness of the joinder of Petitioner with the others and cause this Court to pause. However, the reality is that the gross disparity of the amount of evidence

introduced pertaining to Petitioner is not the only factor which reveals that Petitioner was prejudiced by a joint trial. The evidence probative of additional conspiracies among other co-defendants also caused an enormous amount of confusion. This confusion was such that no jury instruction, relating to evaluating each defendant individually as to each count in the indictment, could adequately dispel the spill-over prejudice against Petitioner. Meester, supra.

II. AS THE GOVERNMENT FAILED TO ESTABLISH THE ESSENTIAL ELEMENTS OF A CONSPIRACY. PETITIONER'S CONVICTION IS NOT SUPPORTED BY A SUFFICIENCY OF THE EVIDENCE THUS VIOLATING PETITIONER'S RIGHT TO DUE PROCESS OF LAW.

When considering sufficiency of evidence on review, the proper inquiry is not whether the reviewing court itself believes that the evidence established guilt beyond a reasonable doubt, but whether, after reviewing

the evidence in the light most favorable to the government, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Burden v. Zant, 903 F.2d 1352 (11th Cir. 1990). While the Court need not exclude every reasonable hypothesis of innocence or find the evidence wholly inconsistent with every conclusion except that of guilt, a defendant's conviction must be reversed when, choosing among the reasonable constructions of evidence, there is lack of substantial evidence to support the jury's verdict. United States v. Cooper, 873 F.2d 269 (11th Cir. 1989), cert. denied, 110 S. Ct. 118 (1989). United States v. Kelly, 888 F.2d 732 (11th Cir. 1989). United States v. Fernandez, 797 F.2d 943, 948-49 (11th Cir. 1986), cert. denied, 107 S. Ct. 3230 (1987). Sufficiency of the evidence is a question of law subject to de novo review. Id. at 739.

A. The Denial of Petitioner's Motion for Acquittal Made Pursuant to Federal Rule of Criminal

Procedure 29. Constituted a Violation of Petitioner's Right to Due Process of Law.

Rule 29 of the Federal Rules of Criminal Procedure governs the procedure for requesting a motion for judgment of acquittal. In the instant case, counsel for Petitioner requested that the Court direct a verdict on behalf of Petitioner. As the Court declined to do so, it erred and Petitioner's conviction should be reversed.

In the context of a narcotics conspiracy, the Government must prove beyond a reasonable doubt that a conspiracy existed, that the Defendant knew at least the essential objectives of the conspiracy, and that Defendant voluntarily participated in the conspiracy. Kelly, at 740. Before a defendant can be convicted as a conspirator, there must be some evidence from which it can be reasonably inferred that the defendant knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it. United States v. Nusraty, 867 F.2d 759 (2nd Cir. 1989). In this case there is no

evidence in the record probative of the proposition that Petitioner knew of the scheme as alleged by the prosecutor in his opening statement, i.e.

> a conspiracy that was able to bring cocaine from the point of its introduction into the United States in Miami and elsewhere, in particular in Southern California to Atlanta through Savannah and Brunswick and Darien and the South Georgia Area and from Miami and Las Vegas through Mississippi, Texas, Nevada, California, Oregon, Washington and Idaho.

The record is devoid of any proof that Petitioner knowingly joined and participated in a conspiracy that stretched across the United States. Suspicious circumstances are not enough to sustain a conviction for conspiracy, nor is a person's mere presence at the scene of the alleged crime. United States v. Kelly, 749 F.2d 1541, 1548-49 (11th Cir. 1985). In this case, the government attempted to build inference upon innuendo to support a guilt by association theory. Specifically, the government attempted to place Petitioner in the presence of the Joneses against whom

evidence of criminality was stronger. (R-22-32-33.) The agent who conducted the surveillance could not conclusively identify Petitioner, however. During testimony at trial, Agent Maynor had to correct his positive identification of Petitioner's voice on call no. 226 and admitted it was a mistake. (R-20-24.)

In United States v. Nusraty, 867 F.2d 759 (2nd Cir. 1989), the government relied on the defendant's appearance at an airport with another individual allegedly involved in the conspiracy. The government urged that "[t]he suspicious circumstances of Nusraty's presence at the airport, and the likelihood that Nusraty knew [the other suspect] would be there certainly support the government's argument that Nusraty's encounter with [the other suspect] was prearranged and not coincidental." However, the court held that this evidence was too thin to warrant an inference of guilty knowledge. The mere presence at the scene of an aborted drug transfer

cannot by itself support a conviction of conspiracy. United States v. Burgos, 579 F.2d 747 (2nd Cir. 1978). Moreover, there is no evidence to show that Petitioner ever took possession, actual or constructive, of contraband. United States v. Rios, 856 F.2d 493 (2nd Cir. 1988).

Absent direct evidence of Petitioner's knowledge of the alleged conspiracy, the government bases the entirety of its case on inferences from conversations and association with other members of the alleged conspiracy. These inferences, however, even taken in the light most favorable to the government, are insufficient to support Petitioner's conviction. Jackson v. Virginia, 99 S. Ct. 2781 (1979).

B. Because a Material Variance Existed Between the Indictment and the Proof Presented at Trial. Petitioner's Conviction is Illegal and in Violation of His Due Process.

The indictment charged Petitioner with one count of conspiracy to possess with intent to distribute cocaine

and a second count of use of a communication facility to facilitate doing the same. (R-1.) However, at trial, evidence and innuendos inconsistent with the charges as contained in the indictment emerged, creating an atmosphere of suspicion which was heightened by the trial court's failure to sever Petitioner from the joint trial. Specifically, an abundance of testimony and proof of a conspiracy to manufacture methamphetamine was introduced through the government's witnesses. Thus, a directed verdict should have been granted on the ground that the proof failed to conform to the indictment.

Although proof of multiple conspiracies does not automatically constitute a fatal variance from a single conspiracy charged, it can be deemed a due process violation if the defendant is not apprised of the charges he faces. United States v. L'Hoste, 609 F.2d 796, 801 (5th Cir.), cert. denied, 449 U.S. 833 (1980). In United States v. Dunbar, 590 F.2d 1340 (5th Cir. 1979), the defendant

unsuccessfully argued to the court that a directed verdict should have been granted in favor of him on the ground that the proof failed to conform to the indictment. Id. at 1343. In that case, the defendant was charged with conspiracy to possess a particular controlled substance, namely Methaqualone. In the course of the investigation, however, an agent received a sample of another drug, Diazapam. The court held that despite the difference in drugs, there was substantial evidence before the jury that the defendant had in fact conspired to possess the substance specified in the indictment. Id.

The instant case is markedly different, because the confusion at trial, manifested by a denial of a motion to sever Petitioner, clouded a fair and just evaluation of the evidence presented to the jury. Thus, the verdict was contrary to the evidence and the Court erred in not directing a verdict for Petitioner.

Wherefore, Petitioner respectfully requests that:

(a) This Petition be filed and Certiorari granted;

(b) Oral argument be granted; and

(c) This Honorable Court find that the conviction is not supported by sufficient evidence to sustain it and that this Honorable Court reverse and remand for new trial upon the joint bases that Petitioner was improperly and unlawfully convicted as a result of the prejudice attendant to a joint trial with multiple defendants charged in multiple conspiracies and that the spillover was so prejudicial as to deny due process of law.

Respectfully submitted,

ROBERT G. FIERER
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Attorney for Petitioner

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Atlanta, Georgia 30303
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## CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the foregoing Petition for Writ of Certiorari upon Assistant United States Attorneys Allen Moye and Art Leach, 1800 United States Courthouse, 75 Spring Street, N.W., Atlanta, Georgia 30303, and the Solicitor General, Department of Justice, Washington, D.C. 20530, by depositing a copy of same in the United States Mails with adequate postage affixed thereto.

This 9th day of June, 1992.

_____

ROBERT G. FIERER

## APPENDIX

Judgment from United States Court of Appeals for the Eleventh Circuit

IN THE
United States Court of Appeals
For The Eleventh Circuit

No. 90-8658

D. C. Docket No. CR 89-373-5

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

versus

ROGER T. ELEY, CHARLES LARRY JONES,
JUDY E. JONES, BRIAN DEFOOR
*Defendants-Appellants.*

**Appeals from the United States District Court for the Northern District of Georgia**

**(March 10, 1992)**

**Before FAY and BIRCH, Circuit Judges, and KAUFMAN*, Senior District Judge**

* Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation

BIRCH, Circuit Judge:

In this appeal we consider challenges raised by four defendants contesting their convictions and sentences for conduct associated with a conspiracy to distribute cocaine. Based on a review of the appellants' arguments and an examination of the record, we find no error providing a basis for reversal.

Accordingly, we AFFIRM the district court's judgment with respect to the various issues raised in this appeal.

## I. BACKGROUND

This appeal is taken from convictions rendered in a joint trial of seven defendants. Defendant-appellants Roger T. Eley, Charles Larry Jones, Judy E. Jones and Brian DeFoor now appeal jury verdicts finding them guilty of offenses related to a conspiracy to distribute cocaine and to possess cocaine with the intent to distribute it. The object of the conspiracy, it appears from the

record, was to acquire cocaine from many sources and to redistribute it for profit.

At trial, the evidence portrayed a distribution network in which the defendants were all involved, each at different levels. The government sought to show that appellant Eley, along with an unindicted coconspirator, received cocaine from a cocaine broker in Miami and distributed the substance from a base in Atlanta. Among Eley's customers was appellant Charles Larry Jones, who delivered cocaine to others for distribution in street-level quantities of ounces and pounds. Jones' wife, appellant Judy Jones, was a participant in conversations concerning her husband's activities as well as certain cocaine transactions. Lastly, appellant Brian DeFoor's role was as a cocaine distributor on behalf of Charles Larry Jones.

Based largely on evidence gained from intercepted calls taken from a wiretap on the Jones' telephone and physical surveillance which showed meetings among

various appellants, the government secured convictions of each defendant on each offense charged in the indictment. Timely notices of appeal were filed, raising issues pertaining to the necessity of electronic surveillance, admission of "bad acts" evidence, denial of motions for severence, sufficiency of the evidence, and sentence calculation. In addition, the government's compliance with the court's discovery orders is contested, as are various other evidentiary rulings. We address in turn those contentions which merit discussion.

## II. DISCUSSION

### A. Motion to Suppress Wiretap Evidence

Appellants Charles Larry Jones and Judy Jones suggest that evidence gained by means of the wiretap on their telephone should have been suppressed. They allege that the government investigators' search warrant application contained material omissions evincing a reckless

disregard for the truth. Under Franks v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676, 57 L.Ed.2d 667 (1978), fruits of a search authorized by a warrant thus tainted must be suppressed. Here, these appellants argue that the court erred in failing to hold a hearing to determine perjury or reckless disregard by the government affiant.

Appellants contest, inter alia, the affidavit's failure to set out the fact that the Joneses were married and were socially acquainted with the other suspects. This factual omission is, however, insignificant. The appellants' social relationships do little to negate the possibility that certain calls would be drug-related. The fact that the appellants had social ties, even if that fact had appeared in the affidavit, clearly would not obviate a finding of probable cause to support surveillance aimed at drug-related conversations among the admittedly acquainted individuals. The other alleged flaws in the affidavit are

equally inconsequential. A defendant is not entitled to a hearing absent a substantial showing that the asserted inaccuracy is necessary to a determination of probable cause. Id.

Appellants further fault the affidavit on the ground that it fails to elaborate the necessity for the wiretap. To support such electronic surveillance, the investigator's statement must, according to federal requirements, include an explanation as to why another less invasive procedure should not be employed. Nevertheless, the government need not show a comprehensive exhaustion of all possible techniques. United States v. Van Horn, 789 F.2d 1492, 1496 (11th Cir.), cert. denied, 479 U.S. 854, 107 S. Ct. 190, 93 L.Ed.2d 123 (1986). Since the appellants have made no plausible allegation besides the assertion that the affidavit fails to catalogue the possible alternatives, this challenge clearly fails. Hence, the wiretap evidence was properly admitted.

B. Rule 404(b) Evidence

Appellants devote much attention to the familiar rule in Fed. R. Evid. 404(b) that evidence of other bad acts is not admissible solely to prove the character of the defendant. Primarily, the appellants' objections pertain to evidence of acts connected with an (assertedly separate) conspiracy to distribute methamphetamine, allegedly occurring within the same timeframe as the cocaine conspiracy set forth in the indictments. They argue that testimony by an unindicted coconspirator with respect to methamphetamine activities should have been excluded or remedied by a contemporaneous limiting instruction.

Because the contested testimony does not constitute extrinsic, or "other acts," evidence for 404(b) purposes, this challenge fails. Evidence of methamphetamine-related components of the broader conspiracy was inextricably intertwined with the cocaine conspiracy for which the appellants were tried. In United States v.

Aleman, 592 F.2d 881 (5th Cir. 1979), this circuit's predecessor held that "[a]n act cannot be characterized as an extrinsic act when the evidence concerning that act and the evidence used to prove the crime charged are inextricably intertwined." Id. at 885. Because the methamphetamine-related activity occurred in the same timeframe, under the same circumstances, and integrally with the cocaine-related acts, testimony concerning the methamphetamine was admissible. See id.; United States v. McDowell, 705 F.2d 426, 429 (11th Cir. 1983). Simply put, that evidence was part of the story of the crime charged. For this reason, it was properly allowed into evidence.

C. Motions for Severence

Appellants also assign error to the district court's denial of motions for severence from the joint trial. Appellant DeFoor specifically argues that because he had

no knowledge of the essentials of the conspiracy, it was an abuse of discretion for the court to deny him a separate trial. Appellant Eley's challenge relates to the presentation of antagonistic arguments by counsel for defendant David Smith, a co-conspirator whose conviction is not challenged in the present appeal. After a review of the record, we find neither argument persuasive.

DeFoor's attack focuses on the specter of guilt by association. He argues that evidence concerning the other appellants' more penetrating involvement in the conspiracy spilled over to create an appearance that he was an equally culpable participant in the conspiracy. He asserts that he was in fact a minor player against whom the government's evidence was comparatively thin. Although the question is close, we find that DeFoor has failed to meet his burden of an affirmative showing that the court abused its discretion in denying his motion. See United States v. Swanson, 572 F.2d 523, 528 (5th Cir.), cert.

denied, 439 U.S. 849, 99 S. Ct. 152, 58 L.Ed.2d 152 (1978). DeFoor asserts merely that the evidence was stronger against his co-defendants and that he was unassociated with the methamphetamine conspiracy mentioned in the coconspirators' testimony. While supported by the record, these assertions do not satisfy DeFoor's burden. To show that he was prejudiced by the spill-over effect of evidence against the other defendants, DeFoor must show more than the bias inherent in a joint trial or that acquittal would be more likely had he been tried separately. United States v. Meester, 762 F.2d 867, 883-84 (11th Cir.), cert. denied, 474 U.S. 1024, 106 S. Ct. 579, 88 L.Ed.2d 562 (1985). Indeed, this circuit has expressly held that neither the existence of stronger evidence against co-defendants nor the defendant's absence from certain components of the conspiracy constitutes sufficient prejudice. Id. The record pertaining to DeFoor does not, therefore, indicate that the district court

abused its discretion in denying his motion for severence.

Appellant Eley directs our attention to the admission of hearsay testimony to the effect that he and co-conspirator David Smith were "good friends." (Eley did not object to this testimony at trial.) He argues that this testimony prompted Smith's counsel to make arguments antagonistic to his position. Antagonistic defenses may, of course, warrant severance. Id. Eley notes specifically that Smith's counsel acknowledged that Smith and Eley were acquaintances. Smith's counsel, however, apparently did so in light of overwhelming evidence of that fact. Because Eley articulates nothing that is plausibly detrimental about this concession by Smith's counsel, we are at a loss to detect any merit to his argument for severence. Hence, there clearly was no abuse of discretion by the court in this matter.

D. Sufficiency of the Evidence

For reasons similar to his arguments in favor of

severance from the joint trial, appellant DeFoor argues that the evidence adduced at trial was insufficient to support his conviction and that his right to due process was therefore violated. In particular, DeFoor asserts that the record is devoid of proof that he, being significantly less involved in the conspiracy, was aware of the actual scope of the cocaine scheme and knowingly joined in it. He further argues that the government's proof of a methamphetamine conspiracy with which he was unassociated departed from the cocaine-related activities for which he was indicted. This nonconformity with the indictment, he claims, laid the groundwork for a conviction based on innuendo.[1]

When considering sufficiency of evidence on review, the proper inquiry is not whether the reviewing court itself believes that the evidence establishes guilt

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[1]Any other prejudicial effects of the methamphetamine-related evidence do not, on this record, require reversal.

beyond a reasonable doubt, but whether, after reviewing the evidence in the light most favorable to the government, a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). We note that where the existence of a conspiracy is established, even slight evidence may suffice to connect a particular participant with the conspiracy. United States v. Orr, 825 F.2d 1537, 1543 (11th Cir. 1987). Each conspirator need not know all the conspiracy's details. or every conspirator, nor need he participate in every phase of the scheme. Id. In light of these principles, we are thoroughly satisfied that the evidence, reviewed in the light most favorable to the prosecution, was sufficient to permit a reasonable trier of fact to convict DeFoor.

E. Sentence Calculation

Appellants Judy and Charles Larry Jones contest their sentences on grounds that they were each held

culpable for greater quantities of cocaine than the amounts actually attributable to them. As a result of these quantitative errors, they contend, their sentences were improperly calculated under the United States Sentencing Guidelines ("U.S.S.G." or "Guidelines"). In reviewing these sentences, we accept the district court's findings of fact unless clearly erroneous. United States v. Marin, 916 F.2d 1536, 1538 (11th Cir. 1990).

Judy Jones was held responsible for 5 or more kilograms of cocaine, which under the Guidelines yielded an offense level of 32. See U.S.S.G. § 2Dl.l(c)(6). The only testimony at trial which indicated her possession of particular amounts of cocaine, she points out, refers vaguely to at most 3 kilograms. She argues that there was therefore no basis for the court's finding that she was involved with 5 kilograms. A review of the record, however, belies her claim. At sentencing, the court based its quantitative finding on Judy Jones' knowledge and

participation, not on the amount of cocaine she personally possessed. R11-10-11. Since ample evidence establishes that Judy Jones was aware of activities involving more than 5 kilograms of cocaine, her attack on the sentencing court's finding fails.

With respect to his sentence, Charles Larry Jones argues that he was erroneously held equally responsible with appellant Eley—the chief participant among the co-defendants. Jones contends that he was improperly assigned the full 111 kilograms of cocaine attributed to Eley, arguing that a participant in a drug conspiracy should not be held accountable for all the activities of his supplier on the basis of the mere foreseeability that the supplier is separately distributing to others. See United States v. North, 900 F.2d 131, 133 (8th Cir. 1990). In so arguing, however, Jones misapprehends the basis for the court's quantitative assessment. In order to hold Jones responsible for the amount of cocaine assigned to Eley,

the court was only required by the law of this circuit to find that Jones "knew, or could reasonably have foreseen, that the activity of the conspiracy in the aggregate would involve" the quantity attributed to him. United States v. Smith, 918 F.2d 1501, 1515 (11th Cir. 1990), cert. denied, _____U.S._____, _____, 112 S.Ct. 151, 253, 116 L.Ed.2d 117, 207 (1991). The evidence shows that Jones worked directly with Eley and was clearly aware of the dimensions of Eley's operation. Given that we must accept the district court's finding unless clearly erroneous. See Marin, 916 F.2d at 1538. We find sufficient basis in the record to affirm the attribution of 111 kilograms to Jones.

F. Rule 16 Disclosure

Another attack on the proceedings below pertains to the government's compliance with Fed. R. Crim. P. 16 and the discovery order issued by the pretrial magistrate judge in this case. Rule 16 requires the government to

disclose recorded statements of a defendant that are in the possession of the government. See Fed. R. Crim. P. 16(a)(1)(A). Hence, the government was required in this case to disclose tapes of wiretapped telephone calls it planned to introduce as evidence. In this case, moreover, during pretrial the magistrate judge ordered individualized discovery, thereby entitling each defendant to notice of which telephone calls related to him or her out of over 3000 calls that were intercepted.[2]

Appellant Eley argues that the government's disclosures were incomplete and misleading, in violation of Rule 16 and the discovery order. These claims, indeed,

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[2]A transcript of the November 29 pretrial conference, appended to appellant Eley's reply brief, makes clear that the magistrate judge ordered the government to identify specifically those tapes on which the appellant's voice appears. There is no support for the government's position that it was required simply to identify and disclose those tapes pertaining to the instant indictments (rather than particular defendants).

find support in the record. Before trial, the government provided to defense counsel over 200 tapes containing intercepted telephone calls. It failed to identify appellant Eley as being a participant in any of the recorded calls, ignoring the individualized discovery order that Eley's counsel had secured from the magistrate judge. Moreover, only after the trial had already begun did the government produce transcripts of recordings which it intended to introduce; on three distinct occasions during the course of trial, the government presented defense counsel with either additional or revised transcripts. Based on the government's poor compliance with discovery requirements, appellant Eley contends that he was entitled to dismissal or suppression of the inadequately produced evidence.

Although it is clear that the government's introduction of particular recorded calls was potentially surprising, its failure to comply fully with the order of the

magistrate did not in itself warrant dismissal. Since defense counsel did receive a set of the tapes used at trial, its discovery interests were minimally satisfied. Therefore we will not disturb the district court's decision not to dismiss. Cf. Fed. R. Crim. P. 16(d)(2) (authorizing such remedy as is "just under the circumstances").

Unless we find an abuse of discretion, we also will not disturb a district court's decision to admit evidence sought to be offered in violation of a discovery order. United States v. White, 846 F.2d 678, 691 (11th Cir.), cert. denied, 488 U.S. 984, 109 S.Ct. S37, 102 L.Ed.2d 566, 568 (1988). Even assuming that a clear violation of the discovery order occurred in this case, it was nevertheless incumbent on the district court to impose the least severe sanction needed to elicit compliance with its orders. United States v. Euceda-Hernandez, 768 F.2d 1307, 1312 (11th Cir. 1985). We bear in mind, moreover, that "exclusion of relevant evidence is an extreme sanction," United

States v. Turner, 871 F.2d 1574, 1580 (11th Cir.), cert. denied, 493 U.S. 997, 110 S.Ct. 552, 107 L.Ed.2d 548 (1989).

Under the circumstances of his case, we find that the district court acted within its discretion in permitting the introduction of relevant telephone conversations. The evidence was made available to defense counsel, albeit not in individualized form,-and the evidence that Eley sought to exclude clearly had high relevance to the government's case in chief. Indeed, it is ironic that the government was less than completely forthcoming in discovery, given the clear relevance and probative value of the disputed telephone conversations; in this case, in which the government marshalled formidable evidence against the appellants, the government's evasive discovery tactics have presented this court of appeal with close questions that fall narrowly short of mandating reversal. Reviewing all the circumstances of this matter, we hold

that the discovery irregularities complained of ultimately do not provide a basis for reversal.

G. Additional Arguments

Appellant Eley presses numerous other arguments in this appeal. Eley contends that he was improperly arrested and his briefcase improperly seized on the basis of a warrant lacking probable cause on its face. The relevant warrant, Eley notes, was later found to lack probable cause by a magistrate judge in the Southern District of Georgia. However, fruits of an arrest will generally not be excluded from evidence where, as here, officers reasonably relied on a warrant only later found to be defective. See United States v. Leon, 468 U.S. 897, 913, 104 S.Ct. 3405, 3415, 82 L.Ed.2d 677 (1984) (tailoring exclusionary rule with respect to objectively reasonable reliance on a defective search warrant). Further, he contends that the allegedly improper arrest resulted in a

detention that hindered his defense and that evidence of the arrest was used as adverse character evidence at trial. These bald assertions fall far short of requiring reversal.

Eley also argues that the district court erred in refusing to order the government to produce evidence in its possession that would impeach coconspirators' statements to be introduced by the government. The court correctly denied Eley's highly generalized request, as the government is only required to report exculpatory or impeachment evidence which, if undisclosed, would be reasonably likely to lead to a different result. See United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985). It is not incumbent on the government to turn over its entire file in response to defense counsel's unspecific request for impeachment evidence. Id. at 675, 105 S.Ct. at 3380.

In addition, Eley urges us to reverse his conviction due to the district court's improper bolstering of the

government's case. He directs our attention to occasions in which the district court criticized defense counsel in the presence of the jury. In fact, however, the court's conduct on the cited occasions amounted to no more than proper management of the trial proceedings. See United States v. Morales, 868 F.2d 1562, 1576 (11th Cir. 1989) (holding that reversal is unwarranted unless the prejudicial comments amount to the denial of a fair trial).

There is clearly no other basis for reversal to be found in Eley's remaining arguments. He assigns error to a number of evidentiary rulings which merit no elaboration here. Additionally, he complains that the government's witnesses improperly bolstered its case and objects to the "overall conduct of this trial by the government." Eley Br. at 12. Based on a thorough review of the record, we find no reversible infirmity in any of these respects.

Moreover, our review of the record discloses no error with respect to any of the appellants' cases to the

extent they have adopted arguments from the briefs of co-appellants.

## III. CONCLUSION

For the foregoing reasons, we affirm the appellants' convictions and sentences in all respects.